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ARTICLES

ANALYTICAL AND COMPARATIVE VARIATIONS ON SELECTED PROVISIONS OF BOOK ONE OF THE LOUISIANA CIVIL CODE WITH SPECIAL CONSIDERATION OF THE ROLE OF FAULT IN THE DETERMINATION OF MARITAL DISPUTES

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INTRODUCTION

This article is intended to be a type of "structuralist"¹ com-

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1. The adjective "structuralist" is borrowed from linguistic and literary theory and generally refers to the Saussurian concept of structuralism—that a literary text or a particular language, although representative of history on a diachronic axis, can be considered independently of historical developments on a synchronic axis (according to the now-celebrated metaphor of the chess board). This general and admittedly simplistic definition of structuralism adequately characterizes the basic methodology used in this commentary. The language of Book I is separated from its historical evolution for the most part; the codal provisions are isolated and taken as an organic whole. The refinements of the decisional law are integrated into the commentary wherever relevant. The commentary also includes a comparative reference: where appropriate, the Louisiana law of Persons is contrasted with its

mentary upon selected provisions in Book I of the Louisiana Civil Code. Its sole purpose is to illustrate, both for pedagogical and doctrinal reasons, some of the analytical difficulties to which these codal provisions might give rise when they are read in a close textual fashion. It should be emphasized that this study is a textual commentary and not a historical assessment of the sources or origins of the codal texts—the latter analysis is outside the purview of the present endeavor.

Accordingly, this article consists of a critical textual evaluation of the relevant codal provisions of Book I of the Louisiana Civil Code, emphasizing internal inconsistencies, ambiguities, and inequities which point to a need for legislative reconsideration and re-drafting. For example, it is difficult from a reading of Book I to identify the actual impediments to marriage. In addition, the provisions relating to putative marriage appear to lead, in certain circumstances, to an easily resolvable injustice to children born of such unions. Moreover, the first book of the Code contains outmoded provisions, such as article 120, which no longer reflect contemporary conceptions about the role of men and women in marriage. Articles 138, 141, and 160 establish the primacy of fault in regulating marital breakdowns and their financial consequences; it is submitted that, upon a close examination of the codal provisions and the applicable jurisprudence, the role of fault not only is ill-defined but also needs to be reevaluated in light of the evolution of mores and the emergence of trends in other civilian jurisdictions. Finally, the issue of legitimacy and the presumption of paternity in article 184 are analyzed for their possible gender-based discriminatory effect.

The gravamen of this article is not to advocate a particular view of marriage or of the role of a fault analysis in the breakdown of marriage, but rather to begin an inquiry into the structural and substantive cohesion of Book I of the Code. The language of article 138 makes the dissolution of marriage a reality; the question remains, however, whether the state, in the exercise of its legitimate regulatory power in this area, has articulated a set of norms which continue to be viable in contemporary society. While moral, religious, and psychological perceptions of marriage may conflict, it is incumbent upon the legislature to arrive at a workable reconciliation of these values by elaborating a set of coherent guiding

analogue in other civilian jurisdictions, most notably France.

principles.

THE IMPEDIMENTS TO MARRIAGE

The Evident Impediments

Louisiana Civil Code article 88 provides that lawful marriages are those which "are contracted between a man and a woman and solemnized according to the rules which the law prescribes."² Despite the fact that marriage in Louisiana is seen "in no other view than as a civil contract,"³ the state nonetheless, because of the social importance of marriage and the family, retains a prescriptive authority which impinges upon the notion of freedom of contract and the autonomy of the parties to establish the terms of their agreement.⁴ But, what are, under Louisiana law, the impediments to the formation of this social contract between individuals?

The language of article 88⁵ appears to prohibit homosexual marriage; under this provision, the conjugal bond can be established only between parties of different sex, "between a man and a woman."⁶ Article 93 seems to provide for an equally unambiguous impediment. "Persons legally married are, until a dissolution of marriage, incapable of contracting another. . . ." Although questions will arise as to what constitutes a legally dissolved marriage, it is undeniable that a person who is already married cannot legally enter into another marriage until the previous marriage has been dissolved. Finally, Louisiana Civil Code article 94 outlines in a straightforward fashion the impediment to direct line relationships: "Marriage between persons related to each other in the direct ascending or descending line is prohibited."⁷ The clarity of the Code, however, appears to end here; arguably, there are no other impediments under Louisiana law to forming valid marriages.

2. LA. CIV. CODE ANN. art. 88 (West Supp. 1982).

3. *Id.* art. 86 (West 1952).

4. See, e.g., R. PASCAL, LOUISIANA FAMILY LAW COURSE 1-34 (1979).

5. See note 2 *supra* and accompanying text.

6. LA. CIV. CODE ANN. art. 88 (West Supp. 1982). A problem may arise here, however, in relation to the marriage of a transsexual. On the transsexual issue, see Holloway, *Transsexuals—Their Legal Sex*, 40 U. COLO. L. REV. 282 (1968).

7. LA. CIV. CODE ANN. art. 93 (West 1952).

8. *Id.* art. 94 (West Supp. 1982).

Age As An Impediment

Age traditionally has been considered an impediment to marriage; it is within the legitimate scope of the state's regulatory power to prevent and prohibit marriages between parties whom it considers too young to take that momentous step. Certainly, a liberal policy on the age question could lead to unstable unions which might ultimately end in divorce, creating social welfare problems with regard to children of the marriage, and perhaps the spouses, and generally undermining the value attaching to family solidarity. Yet, the Code does not establish an unqualified age impediment to contracting a lawful marriage.

Article 92 attempts only in appearance to establish an age limitation to marriage:

Ministers of the gospel and magistrates, entrusted with the power of celebrating marriages, are prohibited to marry any male under the age of eighteen years, and any female under the age of sixteen, and if any of them are convicted of having married such persons, he shall be removed from his office, if a magistrate, or deprived forever of the right of celebrating marriage, if a minister of the gospel.⁹

The distinctive feature of this article is that the age prohibition and corresponding sanction for breach are directed to the celebrants of the marriage and not the parties. An admittedly literal reading of this paragraph of article 92 thus implies that parties of any age can be married in Louisiana provided they can find a celebrant who will not question their ages. Moreover, it does not appear that such marriages can be annulled, for the sanction articulated in article 92 is directed toward the officiating minister and not the parties. The legislative intent in this provision seems to have been to discourage such youthful marriages by placing sanctions where they would be most effective, but to uphold such marriages once they had been contracted. The wording of the article and its focus upon the celebrant undermines the effect of the "age impediment" and—what is worse—makes the notion of minimum age a seemingly perfunctory requirement which lacks any juridical consequence for the validity of marriage.

A seventeen-year-old male, for example, who wishes to marry his sixteen-year-old girlfriend and does so by falsifying documents or through some other artifice (or, say, simply because of the inat-

9. LA. CIV. CODE ANN. art. 92 (West Supp. 1982).

tention or physical disability of the celebrant) would, under article 92, not be subject to any sanction and the marriage, it seems, would be considered valid. Only the celebrant would be subject to a penalty. A reading of the formal language of the Code, then, simply does not support the conclusion that age is an impediment to marriage. The first paragraph of article 92 could have read:

Males under the age of eighteen years, and females under the age of sixteen cannot marry. Marriages which are contracted in violation of these minimum ages will be considered unlawful. Ministers and magistrates who are convicted of having married such persons will be deprived of the right of celebrating marriages (in the case of ministers) and shall be removed from office (in the case of magistrates).

In its present form, article 92 implies a legislative intent to minimize, if not eliminate, any age impediment to marriage in Louisiana.

Minority

The provisions relating to the marriage of minors indicate that the less-than-explicit language of article 92 regarding minimum age for marriage is not the only shadow of ambiguity cast upon the so-called "age impediment" to marriage. Article 97 provides:

The minor of either sex, who has attained the competent age to marry, must have received the consent of his father and mother or of the survivor of them; and if they are both dead, the consent of his tutor.

He must furnish proof of this consent to the officer to whom he applies for permission to marry.¹⁰

Although this article refers to the "minor of either sex,"¹¹ reading the provision in conjunction with article 37 makes clear that it applies to females exclusively. On the one hand, article 37 provides that "[m]inors are those who have not attained the age of eighteen years";¹² on the other hand, article 92 provides, in relevant part, that the competent age to marry for males is eighteen years.¹³ Therefore, males cannot be married by a minister or magistrate until they have reached the age of majority. Females, who can be married by a minister or magistrate at the age of sixteen, must

10. *Id.* art. 97 (West 1952).

11. *Id.*

12. *Id.* art. 37 (West Supp. 1982).

13. *Id.* art. 92.

receive the consent of both parents in order to marry before the age of eighteen. There is an evident need to eliminate the discrepancy between the language of articles 37, 92, and 97, perhaps by amending the age requirement in article 92 to reflect the contemporary standards established in article 37. This reformulation is the only way to give the opening clause of article 97 meaning within the pattern of regulation outlined in Book I.

Second, the language of article 97 expressly provides that consent must be had of the father *and* mother.¹⁴ What happens if the parents disagree—if the mother agrees to the marriage, but the father withholds his consent and cannot be persuaded to approve the marriage? Unlike the current French law,¹⁵ the Louisiana Civil Code does not provide that a disagreement between the parents amounts to consent. Rather than provide an easy or a functional remedy for these family disputes, the Louisiana Civil Code seems to give priority to the notion of family solidarity—that a minor within the family cannot establish her own family without the approval of both parents. Despite the equality of status that such a provision implicitly establishes between the husband and wife in terms of authority within the household (this contrasts markedly with other provisions of Book I, most notably article 120¹⁶ and to a lesser extent with article 216¹⁷), one wonders whether such a system is not more conducive to family disharmony than to unity. These doubts are especially strong when the legal consequences of the failure to obtain the requisite consent are mapped out in relation to the validity of such marriages.

Third, unlike the provisions of article 92, the minor must furnish proof to the celebrant that she has obtained the consent of her parents to marry. In direct contrast to article 92, article 97 addresses the party to the marriage, regulates her conduct, and imposes responsibilities upon her. This provision has all the makings of an absolute impediment, were it not for the fact that the sanction imposed for the failure to comply with the requirement has, by explicit codal language, no bearing upon the validity of such marriages. Article 112 reads:

The marriage of minors, contracted without the consent of the fa-

14. *Id.* art. 97 (West 1952).

15. CODE CIVIL [C. CIV.] art. 148 (Fr.).

16. LA. CIV. CODE ANN. art. 120 (West 1952).

17. *Id.* art. 216.

ther and mother, can not for that cause be annulled, if it is otherwise contracted with the formalities prescribed by law; but such want of consent shall be a good cause for the father and mother to disinherit their children thus married, if they think proper.¹⁸

In summary, the codal provisions relating to the age requirement for marriage are confusing in their substance and unclear in their policy. The Code appears simultaneously to affirm its commitment to traditional views about the power of the state to prescribe age requirements, and to subvert those traditional principles by rendering them ineffective to influence the legal validity of non-complying marriages. The Code seems to proclaim family solidarity as the driving force of the law of Persons and, in the same breath, couches its proclamation in language that speaks more to the right of adolescents to marry despite would-be impediments of the state or the opposition of the parents. Given this oscillation, it is difficult to ascertain whether the notion of "age impediment" to marriage is still a part of Book I of the Code. One might be tempted to conclude that age simply has no direct bearing upon the validity of marriage; that, despite the apparent coexistence of competing policy perspectives, the Code appears to validate marriages despite failure to respect the age requirement. This statement seems to be the message the Code conveys to the courts and to the legal community; obviously, the message could have been drafted in more forthright and less convoluted language.¹⁹

Consanguinity

Nor are the consanguinity prohibitions free of difficulty. While the language of article 94 is classic and clear-cut, article 95 contains a troublesome and perplexing paragraph. Article 94 establishes unequivocally that the scope of the consanguinity prohibition extends to "persons related to each other in the direct ascending or descending line," adding that "[t]his prohibition is not confined to legitimate children, it extends also to children born out of marriage."²⁰ The language of article 95, which establishes the impediment relating to collateral relationships, reads in relevant part: "Among collateral relations, marriage is prohibited be-

18. *Id.* art. 112.

19. For a discussion of this topic, see *The Work of the Louisiana Legislature for the 1978 Regular Session—A Student Symposium*, 39 LA. L. REV. 129 (1978) and Note, 36 LA. L. REV. 826 (1976). See also R. PASCAL, *supra* note 4, at 54-56.

20. LA. CIV. CODE ANN. art. 94 (West Supp. 1982).

tween brother and sister, whether of the whole or of the half blood, whether legitimate or illegitimate, between uncle and niece, between aunt and nephew, and also between first cousins."²¹ The serious tenor of this provision and its status as a bona fide and unqualified impediment to marriage is attested to by the subsequent language of the article, preventing the evasion of the impediment through jurisdictional and procedural stratagems:

No marriage contracted in contravention of the above provisions in another state by citizens of this state, without first having acquired a domicile out of this state, shall have any legal effect in this state.

No officer whose duty it is to issue a marriage license shall do so until he shall have received an affidavit from one of the parties to the marriage to the effect that he or she is not related to the other party within the degree prohibited hereinbefore.²²

These two statements clearly evidence a legislative intent to have the impediment of collateral relationships fully applied and enforced, translating a commonly-held view that such marital unions are morally abhorrent and biologically dangerous.

The third paragraph of article 95, however, undercuts and perhaps eliminates the effect of the foregoing language. It reads that "[a]ll such marriages heretofore made in contravention of the above provisions shall be considered as legal."²³ In other words, all marriages entered into before 1981, the date of the last reenactment of the third paragraph, which violated the impediment of collateral relationships, are nonetheless lawful.²⁴ The language of the third paragraph raises two questions: (1) What is the status of the legal impediment to marriage relating to collateral relationships? (2) What is the future status of the impediment for marriages that are entered into after 1981? Does the third paragraph of article 95 in effect indicate a legislative intent to eliminate the impediment while maintaining it formally and perfunctorily in the Code?

By enacting this third paragraph, it appears evident that the legislature was responding to a social problem, namely, that there may be too many marriages of this type, especially first cousin marriages, in Louisiana to apply a blanket prohibition and thereby

21. *Id.* art. 95.

22. *Id.*

23. *Id.*

24. *Id.*

undermine a wide number of extant relationships. On the one hand, the legislature achieved a rather delicate balance between certain public policy considerations regarding marriage and the need to respond with an intelligent sense of realism and sensitivity to a current problem. On the other hand, in light of the difficulties that might attend the interpretation of the other impediments to marriage in Chapter Two of Title Four, one wonders whether the integration of a wide-ranging exception was the most appropriate way of responding to the problem. From the perspective of general interpretation, paragraph three of article 95 at least places the impediment of collateral relationships in an ambiguous posture and may even appear to gut the impediment entirely. Obviously, the legislature wanted to maintain the statement of this classical impediment in the Code, but, in its present form with the addition of the third paragraph, it seems—at least to some degree—that the provision is meaningless. This interpretation is buttressed by the fact that the whole of Chapter Two seems to adopt, albeit indirectly, a very restrictive attitude toward the notion of legal impediments to marriage—an attitude which gains some expression in the language of article 96, which reads that “[a]ll other impediments on account of relationship or affinity are abolished.”²⁵

Interpreted as an organic whole, Chapters One and Two of Title Four are characterized by an understated, but nonetheless distinct, policy that the power of state regulation should be minimized whenever possible and the parties given the right, despite certain disabilities, to enter into the contractual arrangement. It would appear, however, to be more logical and consistent to articulate these policy objectives in language that more clearly reflects this basic legislative intent, thereby clarifying the exact status of the would-be age and collateral relationship impediments.

THE PUTATIVE MARRIAGE RULES

Judicial Construction of Articles 117 and 118

The key provision of articles 117 and 118 is the good faith requirement—a null marriage will produce its civil effects as to the parties and their children only if the marriage was contracted in good faith.²⁶ If only one of the parties acted in good faith, *i.e.*, was

25. *Id.* art. 96 (West 1952).

26. *Id.* arts. 117 & 118.

unaware, for example, that his or her partner was already married, then, under article 118, "the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage."²⁷ The courts, in their jurisprudence, have interpreted the provisions of articles 117 and 118 quite liberally,²⁸ in conformity with what seems to be the legislative intent that underlies the codal language.

According to the jurisprudence, the putative marriage doctrine means that the civil effects of marriage will flow in favor of the party who marries in good faith and the children born of that marriage.²⁹ Conferring the status of a putative spouse upon a partner to a void marriage is especially important for wrongful death and workmen's compensation actions;³⁰ the courts, for example, have excluded concubines (defined by the courts as a bad faith spouse in a putative marriage) from benefits under workmen's compensation statutes.³¹ A good faith putative wife has the right of the surviving wife to the marital portion.³² Moreover, under article 160, the good faith putative wife may be entitled to permanent alimony from a

27. *Id.* art. 118.

28. See, e.g., *Lee v. Hunt*, 483 F. Supp. 826 (W.D. La. 1979), *aff'd*, 631 F.2d 1171 (5th Cir. 1980); *King v. Cancienne*, 316 So. 2d 366 (La. 1975); *In re Koonce*, 380 So. 2d 140 (La. App. 1st Cir. 1979), *writ denied*, 383 So. 2d 23 (La. 1980).

29. See, e.g., *Kimball v. Folsom*, 150 F. Supp. 482 (W.D. La. 1957); *Weaver v. Byrd*, 126 So. 2d 385 (La. App. 2d Cir.), *cert. denied*, 126 So. 2d 385 (La. 1960); *Succession of Hopkins*, 114 So. 2d 742 (La. App. 1st Cir. 1959).

30. See, e.g., *King v. Cancienne*, 316 So. 2d 366 (La. 1975); *Succession of Fields*, 222 La. 310, 62 So. 2d 495 (1952); *Liberty Mut. Ins. Co. v. Caesar*, 345 So. 2d 64 (La. App. 3d Cir.), *writ denied*, 347 So. 2d 1118 (La. 1977).

31. See, e.g., *Liberty Mut. Ins. Co. v. Caesar*, 345 So. 2d 64 (La. App. 3d Cir.), *cert. denied*, 347 So. 2d 1118 (La. 1977). *But see* *Henderson v. Travelers Ins. Co.*, 354 So. 2d 1031 (La. 1978), in which former Justice Tate, now on the Federal Fifth Circuit Court of Appeals, reversed the jurisprudential position established in *Humphreys v. Marquette Cas. Co.*, 235 La. 355, 103 So. 2d 895 (La. 1958), disallowing workmen's compensation benefits to concubines. The Tate opinion in *Henderson* is characteristically brilliant and masterful; it is cast in an analytic mold that usually applies in delictual liability cases. Rather than focusing upon the family law aspect of the litigation, Justice Tate, to the vehement objections of former Justice Summers, emphasizes exclusively the socioeconomic purpose of the workmen's compensation statute, disregarding totally the very pertinent language of article 88 of the Code. Despite the limited character of its holding, *Henderson* appears to work a substantial change upon Book I without ever taking its provisions into account. While the result is far from objectionable, especially in light of the circumstances of the case, it may herald the expansion of judicial discretion and activity in this area, leading to the application of a type of tort liability calculus in Persons litigation. In light of its implications upon the distinctly civilian features of this litigation and upon the notion of state regulation and public policy, the *Henderson* reasoning and holding may represent an interesting but untoward judicial initiative.

32. See, e.g., *Succession of Fields*, 222 La. 310, 62 So. 2d 495 (1952).

bad faith husband,³³ (presumably, uniquely without reference to fault since no marriage existed in which fault could take place). The children born of such a union are legitimate provided at least one spouse contracted the marriage in good faith.³⁴ The civil effects of marriage will continue for as long as the putative spouse remains in good faith, *i.e.*, they will terminate upon the spouse gaining knowledge of the invalidity of the marriage.³⁵

The Test of Good Faith

As mentioned previously, the crucial requirement of the putative marriage doctrine is that it applies only when at least one of the parties is in good faith. The test applied by the courts in Louisiana to determine good faith centers upon the determination of whether the spouse claiming the effects of a putative marriage had an honest and a reasonable belief that the marriage was valid and that no legal impediment existed.³⁶ Decisional law has emphasized that the test to assess the quality of the spouse's belief does not require an absolute belief, but rather a relative one.³⁷ Moreover, the existence of a good faith belief has been characterized as a factual question, to be determined in an *ad hoc* fashion according to the specific circumstances of each case.³⁸ In addition, courts have ruled that, when a claim of putative marriage arises, good faith is presumed to exist in favor of the party claiming to be a putative spouse who entered into the marriage without any impediment.³⁹ Finally, in another formulation of the presumptive standard, the courts have held that good faith on the part of the parties to a

33. See, *e.g.*, *Cortes v. Fleming*, 307 So. 2d 611 (La. 1974). See also Annot., 81 A.L.R.3d 281 (1977).

34. See, *e.g.*, *Succession of Zinsel*, 360 So. 2d 587 (La. App. 4th Cir.), *writ denied*, 363 So. 2d 72 (La. 1978); *Succession of Barbier*, 296 So. 2d 390 (La. App. 4th Cir. 1974); *Farrell v. Farrell*, 275 So. 2d 489 (La. App. 1st Cir. 1973).

35. See, *e.g.*, *Lee v. Hunt*, 483 F. Supp. 826 (W.D. La. 1979), *aff'd*, 631 F.2d 1171 (5th Cir. 1980).

36. See, *e.g.*, *Gathright v. Smith*, 368 So. 2d 679 (La. 1979); *Succession of Pigg*, 228 La. 799, 84 So. 2d 196 (1955); *Succession of Fields*, 222 La. 310, 62 So. 2d 495 (1952); *Clark v. Clark*, 192 So. 2d 594 (La. App. 3d Cir. 1966); *Succession of Primus*, 131 So. 2d 319 (La. App. 1st Cir. 1961). But see *Brinson v. Brinson*, 233 La. 417, 96 So. 2d 653 (1957).

37. See, *e.g.*, *Succession of Primus*, 131 So. 2d 319 (La. App. 1st Cir. 1961).

38. See, *e.g.*, *Eddy v. Eddy*, 271 So. 2d 333 (La. App. 2d Cir. 1972), *writ refused*, 272 So. 2d 695 (La. 1973); *Jones v. Equitable Life Assur. Soc.*, 173 So. 2d 373 (La. App. 1st Cir.), *writ refused*, 247 La. 1019, 175 So. 2d 302 (1965); *Succession of Davis*, 142 So. 2d 481 (La. App. 2d Cir. 1962).

39. See, *e.g.*, *Succession of Fuselier*, 325 So. 2d 296 (La. App. 3d Cir. 1975), *writs refused*, 329 So. 2d 462 (La. 1976).

putative marriage is presumed, and the burden of proof to establish bad faith rests with the opponent. Any doubts will be resolved in favor of a finding of good faith.⁴⁰

The Rights of the Children

Despite the liberal judicial construction and application of articles 117 and 118 and the flexible definition of the good faith requirement, one inequity seems to arise from the literal language of the codal provisions. For the adults in the relationship, putative status has an important impact upon alimony considerations, wrongful death actions, and workmen's compensation claims as well as upon succession rights. For example, according to the jurisprudence, a good-faith putative wife may be entitled to permanent alimony as a civil effect of a putative marriage from a bad-faith husband.⁴¹ Moreover, if a man marries a second wife who is in good faith, but the man does not have his first marriage dissolved, both his spouses are allowed to share in his succession, each spouse being entitled to one-half of the community property acquired during the coexistence of the two marriages.⁴²

Upon initial analysis, the legal rights of the children born of a would-be putative marriage appear to be as strongly protected as those of a good-faith putative spouse. For example, in circumstances in which a putative marriage ends soon after the birth of a child, that child is entitled, according to the decisional law, to a forced portion amounting to one-third of his father's estate, or he can share equally with his half-brother in his father's succession (in addition to having a claim to child support).⁴³ Moreover, the courts also have held that a child born of a putative marriage—one contracted in good faith by at least one of the parties—is considered a legitimate child as to both contracting parties.⁴⁴ This apparently liberal jurisprudential position, inspired in all likelihood by the express language of article 118, contains the seeds of a flagrant

40. See, e.g., *Succession of Zinsel*, 360 So. 2d 587 (La. App. 4th Cir.), *writ denied*, 363 So. 2d 72 (La. 1978); *Succession of Barbier*, 296 So. 2d 390 (La. App. 4th Cir. 1974).

41. See note 33 *supra* and accompanying text.

42. See, e.g., *Prince v. Hopson*, 230 La. 575, 89 So. 2d 128 (1956); *Succession of Choyce*, 183 So. 2d 457 (La. App. 2d Cir.), *writ refused*, 249 La. 64, 184 So. 2d 735 (1966).

43. See, e.g., *Succession of Zinsel*, 360 So. 2d 587 (La. App. 4th Cir.), *writ denied*, 363 So. 2d 72 (La. 1978); *Succession of Barbier*, 296 So. 2d 390 (La. App. 4th Cir. 1974).

44. See, e.g., *Cortes v. Fleming*, 267 So. 2d 236 (La. App. 4th Cir. 1972), *rev'd on other grounds*, 307 So. 2d 611 (La. 1974); *Melancon v. Sonnier*, 157 So. 2d 577 (La. App. 3d Cir. 1963).

inequity which stands in complete contradistinction to the pre-1976 decisional law regarding the legitimacy of children and the presumption of paternity contained in article 184. The codal provisions and the decisional law that accompanies them and illustrates their meaning make the status of children totally dependent upon whether at least one of the parties contracted the marriage in good faith. According to the jurisprudence, in circumstances in which both parties contracted the marriage with knowledge, for example, of an undissolved prior union, *i.e.*, neither party was in good faith, the marriage is void *ab initio* and does not produce any legal effect as to the issue.⁴⁵

The express language of article 118 leaves the courts with little recourse but to apply the good faith requirement as it is stated. The explicit language and unmistakable intent of a codal provision, however, do not always act as a sufficient obstacle to judicial creativity, preventing the courts from finding ambiguity even in the most clear-cut provisions and reaching holdings which, despite their evident departure from the result mandated by the legislative will, foster a judicially-favored policy objective. An evident case in point of this type of judicial legislation concerns the pre-1976 jurisprudence relating to the article 184 presumption of paternity. There, the courts sometimes attributed paternity to a husband despite uncontestable biological facts to the contrary.⁴⁶ The policy objective here was to confer the status of legitimacy upon all children (who, in this equation, were innocent victims) at any price and in complete disregard of the rights and interests of blameless husbands of wives who engaged in provable extra-marital episodes. Reasoning by analogy from the article 184 jurisprudence, the courts, when confronted with a policy dilemma under article 118, had a choice between two alternatives: either subvert the semantic content of article 118 or engage—by a relaxation of evidentiary standards—in a process of finding good faith on the part of at least one spouse in every putative marriage case. The Louisiana courts, however, appeared to have found each alternative unsatisfactory, perhaps in light of the implications of such a position for alimony, wrongful death, and workmen's compensation actions. In a word, the courts seem to have applied the language of article 118 without any overriding policy objective in mind which would contradict the

45. See, *e.g.*, *Burrell v. Burrell*, 154 So. 2d 103 (La. App. 1st Cir. 1963).

46. See Spaht & Shaw, *The Strongest Presumption Challenged: Speculations on Warren v. Richard and Succession of Mitchell*, 37 LA. L. REV. 59 (1976).

express language of the codal provision.

This judicial construction, however, is inconsonant with the policy imperatives that underpin the legitimacy rulings, creating a tension between the manner in which the courts interpret two different but closely related sections of Book I. In marked contrast to the paternity holdings, under article 118 the children born of a nonputative void marriage are helpless innocent victims who pay the price for the conduct of two adults: their status as legitimate or illegitimate children is determined completely by the acts and intentions of their biological parents (at least one of whom must have contracted the marriage in good faith if the children are to gain the status of legitimate children).

Recommendations: The French Example

It could and probably will be argued that this type of inequity, given the liberal judicial definition of good faith in this context and the remote possibility that a suitable case would arise, is of no practical moment. Such cases, however, are far from inconceivable; they have actually arisen.⁴⁷ More importantly, in systemic terms, a codal provision bearing the seeds of an injustice should be reconsidered and modified. Moreover, if the Code is to be seen as an organic text which provides unambiguous and principled juridical guidance for the regulation of social relationships, it appears incongruous to allow related sections of the same book of the Code to be construed with a different policy calculus in mind. Little seems to be at stake regarding the concept of family solidarity—the often cited ideological value promoted by the Code. The rights and interests of children whose parents married without conforming to legal prescriptions appear to be the paramount consideration in this framework.

Engaging in judicial distortion or disregard of the unmistakable language of article 118 is inapposite in a civilian jurisdiction. Reformulation of the codal language is a more appropriate solution and could be achieved by comparing the Louisiana provisions to their analogues in the French *Code civil*. Articles 201 and 202 of the French Code establish two distinct sets of rules relating to the legal consequences of a would-be putative union. One regime pertains to the spouses and the other concerns the children born of

47. See note 45 *supra* and accompanying text.

such a marriage. Much like its counterpart in the Louisiana Code, article 201 of the French *Code civil*⁴⁸ provides that a "null marriage produces its effects in regard to the spouses if the marriage was contracted in good faith."⁴⁹ The language of article 201 further states that "if there is good faith only on the part of one spouse, the marriage will produce its effects only as to that spouse."⁵⁰ Unlike its analogue in the Louisiana Code, article 202 of the French *Code civil*⁵¹ states that the civil effects of a null marriage will take place in relation to the children of the marriage "even if both spouses are in bad faith."⁵² In these cases, the questions relating to the children will be handled as in a divorce case;⁵³ their status as legitimate children is never brought into question.

The comparison to French law is instructive and provides a clear example of how to eliminate the inequity that might attend the literal application of the good faith requirement in articles 117 and 118 of the Louisiana Civil Code. The integration of a provision similar to article 202 of the French *Code civil* would eliminate any possibility that children of a void marriage could be victimized by the actions of their biological parents. This type of outcome not only corresponds with a basic common-sense understanding of what result should be achieved in such situations, but also it is in keeping with the liberal thrust of the judicial construction of articles 117 and 118 and the jurisprudence and recent legislation concerning the legitimacy question. Finally, such a modification of the codal text would not compromise the commitment of the Civil Code to the concept of family solidarity (if that value remains a part of the ideological foundation of the Code).

EQUALITY OF RIGHTS AND DUTIES BETWEEN SPOUSES

Articles 119 and 120 of the Louisiana Civil Code articulate the respective rights and duties of married persons.⁵⁴ The substance of these provisions, in some respects, is inconsistent with the recent reform of Book 3 of the Code⁵⁵ and raises issues regarding the sta-

48. C. civ. art. 201.

49. *Id.*

50. *Id.*

51. *Id.* art 202.

52. *Id.*

53. *Id.*

54. LA. CIV. CODE ANN. arts. 119 & 120 (West 1952).

55. See Riley, *Analysis of The 1980 Revision of The Matrimonial Regimes Law of*

tus of women under Louisiana's Law of Persons. Article 119 clearly establishes that a principle of equality (in the sense of mutuality and reciprocity) governs the duties of husbands and wives. The parties to the marriage "owe to each other *mutually*, fidelity, support and assistance."⁵⁶ The specific content of these duties has been defined by the courts in the context of particular cases;⁵⁷ since they have a public policy character, these duties cannot be modified by the agreement of the parties.⁵⁸

The substance of article 120 contains the statement of a more traditional, if not outmoded, view of the respective position of the husband and wife in the marriage relationship. According to the language of article 120, "[t]he wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition."⁵⁹ Although the husband and wife both have obligations under this provision, the notion of mutuality is only dimly apparent and certainly does not imply equal duties between the spouses. Rather, article 120 emphasizes consecrated social and economic differences between the spouses. The Louisiana Code here is faithful to a long-standing civilian tradition of the *bonus paterfamilias* which views the husband as the head of the household and the primary authority figure in the family. Obviously, this tradition upholds the notion of family solidarity in its classical sense; establishing one spouse as the principal authority in the family minimizes the disunity that can emerge from uncontrollable dissent between the spouses. Moreover, it appears that the language of article 120 reflects an economic reality that may still characterize most Louisiana households: the husband is the principal source of income for the family, and his occupation may require him to move to another location. In order to keep the family together during what may be a difficult transition, the Code obliges the wife and children to accompany the husband and father to the new location, provided the husband welcomes the wife to the new domicile and

Louisiana, 26 LOY. L. REV. 453 (1980).

56. LA. CIV. CODE ANN. art. 119 (West 1952) (emphasis added).

57. See, e.g., *Smith v. Smith*, 382 So. 2d 972 (La. App. 1st Cir. 1980); *Hingle v. Hingle*, 369 So. 2d 271 (La. App. 4th Cir. 1979); *Favrot v. Barnes*, 332 So. 2d 873 (La. App. 4th Cir.), *rev'd on other grounds*, 339 So. 2d 843 (La.), *cert. denied*, 429 U.S. 961 (1976), *cert. denied*, 431 U.S. 966 (1977).

58. See, e.g., *Holliday v. Holliday*, 358 So. 2d 618 (La. 1978).

59. LA. CIV. CODE ANN. art. 120 (West 1952).

furnishes her with the "convenience of life, in proportion to his means and condition."⁶⁰

The decisional law, of course, has addressed the evident problems of defining the circumstances in which a refusal to follow the husband constitutes abandonment,⁶¹ when his choice of a conjugal domicile is unreasonable,⁶² and what is meant by the term "convenience of life."⁶³ The language and substance of article 120, however, raise preliminary issues of more fundamental importance. First, there is the question of the consistency between the substance of article 120 on the one hand and, on the other hand, the language of article 119 and the recent reform of Book 3 which now provides for the equal management of the community property regime by the spouses.⁶⁴ Moreover, the maternal preference rule in child custody cases has been challenged by the best-interest-of-the-child formula in article 146⁶⁵ and the former gender-based discrimination for alimony purposes has been abolished under the reformulation of article 160.⁶⁶ In light of these developments, which neutralized in terms of gender-based distinctions the codal texts, why does article 120 continue to express the duty of married couples to cohabit in terms of sexual differences? This unjustified inconsistency has dire implications for the legal status of women in marriage. Are they to have an inferior status to men in terms of conjugal authority? Other civilian jurisdictions, like France, have eliminated any formal legal disparity between men and women in the marital relationship. According to article 215 of the French

60. *Id.*

61. *See, e.g.,* Stelly v. Montgomery, 347 So. 2d 1145 (La. 1977); Bush v. Bush, 232 La. 747, 95 So. 2d 298 (1957).

62. *See, e.g.,* Bush v. Bush, 232 La. 747, 95 So. 2d 298 (1957); Welsh v. Welsh, 322 So. 2d 352 (La. App. 4th Cir. 1975), *aff'd*, 334 So. 2d 395 (La. 1976); Berry v. Berry, 300 So. 2d 246 (La. App. 2d Cir. 1974), *rev'd on other grounds*, 310 So. 2d 626 (La. 1975); Authement v. Authement, 254 So. 2d 630 (La. App. 3d Cir. 1971); Powell v. Powell, 152 So. 2d 609 (La. App. 2d Cir. 1963).

63. *See, e.g.,* Failla v. Grandeury, 295 So. 2d 24 (La. App. 4th Cir. 1974); General Tire Serv. v. Nash, 273 So. 2d 539 (La. App. 1st Cir. 1973); Leon Godchaux Clothing Co. v. Ruiz, 179 So. 2d 661 (La. App. 4th Cir. 1965); Hagedorn Motors, Inc. v. Godwin, 170 So. 2d 779 (La. App. 1st Cir. 1964).

64. For a discussion of the latter topic, *see, e.g.,* Tete, *A Critique of the Equal Management Act of 1978*, 39 LA. L. REV. 491 (1979).

65. *Compare* Thornton v. Thornton, 377 So. 2d 417 (La. App. 2d Cir. 1979), *with* Nolte v. Nolte, 258 So. 2d 118 (La. App. 2d Cir.), *writ refused*, 261 La. 538, 260 So. 2d 321 (1972). *See also* Note, 34 LA. L. REV. 881 (1974); Note, 38 LA. L. REV. 1096 (1978).

66. *See, e.g.,* Lovell v. Lovell, 378 So. 2d 418 (La. 1979); Bruner v. Bruner, 373 So. 2d 971 (La. App. 2d Cir. 1979).

Code civil,⁶⁷ the husband and wife are to choose the conjugal domicile by common agreement. Moreover, the French Code refers expressly to the concept of parental authority,⁶⁸ while the Louisiana Civil Code, at least in its major headings, still speaks in terms of paternal authority.⁶⁹

Second, does the subordination of the wife to the husband's authority under article 120 as long as he provides material comfort reflect the contemporary view of the marital relationship? Within a perhaps elite and privileged class in society, it is not uncommon to find that both partners to the marriage have professional training and both may be pursuing separate and equally prestigious and satisfying careers. In such circumstances, if the economic rationale for article 120 is recognized, the choice of a conjugal abode should be left to the mutual decision of both partners; the law should not give the husband the privilege of suing his wife for separation on the ground of abandonment simply because she does not wish to adhere to his choice of a conjugal domicile which answers exclusively his professional needs. The express language of article 120 simply does not take this contingency into account, giving some, if not all, husbands an unwarranted legal advantage.

More importantly, however, the reevaluation of the role of women in society goes beyond the ideology of a particular socioeconomic stratum and has become a fairly pervasive value within society as a whole. The incorporation of the equal management principle into the community property regime is testimony to the wider social currency of the principle of equality among spouses—that one spouse is not, simply because of sex, less capable of making decisions affecting the position of the family in society. The language of article 120 is a discordant echo from the past. Indeed, there is a misanthropic tenor to the language which depreciates and demeans the conjugal union—wives should render servile obedience to husbands as long as they are paid for their willingness to cohabit with them. This is an outmoded and offensive conception of what it means to have married persons live together as part of their legal and public policy obligations toward one another. The substance of article 120 should be aligned with the mutuality principle that governs article 119, borrowing to some extent from the example of its counterpart in the French *Code civil*.

67. C. civ. art. 215.

68. *Id.* arts. 371-387.

69. See Title VII, ch. 5 of Book I of the Louisiana Civil Code.

THE ROLE OF FAULT

The Predominance of Fault

The role of fault in the imposition of legal liability is one of the most controversial questions in all of legal literature; it surfaces not only in divorce and alimony determinations, but also in other critical areas of the law—the law of torts and the debate surrounding the concept of strict liability being a prime example. Book I of the Louisiana Civil Code makes the concept of fault⁷⁰ a central factor in the determination of whether a marriage will be legally dissolved and also in assessing the financial consequences of such a dissolution. The grounds for separation in the Louisiana Civil Code can be characterized as hybrid and somewhat imbalanced, since they include both a fault and a nonfault component.

Article 138,⁷¹ which enumerates ten causes for separation from bed and board, does not adhere exclusively to a fault-based notion of separation, but it nonetheless lends primacy to the concept of fault. The first eight causes represent the traditional fault grounds for separation contained in most civil codes, including adultery, conviction of a serious criminal offense, habitual intemperance or cruel treatment, abandonment, and the like.⁷² Article 138 then lists two nonfault or mutual consent grounds which are based upon voluntary de facto separation of the spouses for a given period of time. The fault grounds, however, are enumerated first and in some detail, while the nonfault grounds are given less prominence in the body of article 138, being listed last.⁷³

The hybrid character of the grounds for separation and ultimately for divorce in the Louisiana Civil Code points to a tension between the express and implied definition of marriage. Attributing such evident primacy to the fault concept of divorce (divorce as

70. The concept of fault in the area of Persons has given rise to numerous commentaries; a representative sample of the leading recent studies includes: Couch, *Toward a More Realistic Divorce Law*, 43 TUL. L. REV. 243 (1969); Spaht, *Persons, The Work of the Louisiana Appellate Courts for the 1979-1980 Term—A Faculty Symposium*, 41 LA. L. REV. 372 (1981); Spaht, *Persons, The Work of the Louisiana Appellate Courts for the 1978-1979 Term—A Faculty Symposium*, 40 LA. L. REV. 543 (1980); Spaht, *Persons, The Work of the Louisiana Appellate Courts for the 1977-1978 Term—A Faculty Symposium*, 39 LA. L. REV. 659 (1979).

71. LA. CIV. CODE ANN. art. 138 (West Supp. 1982).

72. *Id.*

73. *Id.*

a sanction) and maintaining a rigid distinction between separation from bed and board and immediate divorce (allowing the latter only for egregious fault, thereby mandating recourse to the former) *per force* make the dissolution of marriage difficult and painstaking. The Louisiana codal provision, therefore, voices at least implicitly an ecclesiastic view of marriage—marriage as an indissoluble sacramental bond. At the same time, the Code contains an expressly secular definition of marriage; according to the language of article 86, marriage is considered “in no other view than as a civil contract.”⁷⁴ If marriage is in fact understood as a civil contract—devoid of religious overtones, not only should the dissolution of marriage be allowed, but also the means of dissolving marriage should be seen as an official way of stating that the marital union has become intolerable for at least one spouse. The substance of article 138 allows the notion of the state regulation of marriage and the family for the well-being of the community to overshadow the concept of marriage as a civil contract which can be rescinded by the parties for “defective” performance. As such, the predominance of fault gives the value of family solidarity its strongest expression: marriages, as a general rule, will not be dissolved unless there has been a grave violation of marital duties and, once such a violation has been established, the culprit must be made to pay for his wrongful conduct. One wonders, however, whether making separation and divorce difficult by incorporating an unbending concept of fault into the separation and divorce grounds is indeed supportive of the value of family solidarity.

Is a nineteenth century quasi-ecclesiastic view of marriage relevant in the late twentieth century? Do marriages fail because one spouse bears the burden of fault exclusively? Is the notion of culpability workable in this traumatic and highly personal context? Although fault-based determinations may be appropriate in some (perhaps exceptional) cases, divorce should be seen as a solution to a difficult problem which minimizes personal antagonisms rather than as a form of punishment. Relegating the traditional fault grounds to a limited role in the termination of marriage would lend support to the view that the parties to the marital contract can decide when their agreement is no longer viable, that they need not go through the agonizing process of arguing culpability back and forth, and that the psychological reality of bankrupt marriages

74. *Id.* art. 86.

precludes any reference to legal fault in most cases. The legislative "preoccupation with fault"⁷⁵ can be seen as an unwarranted infringement upon the freedom of individuals to make choices that seriously affect the course of their lives.

The realities of life and personal relationships make little room for an unbending and absolute view of marriage; a humanly intolerable situation needs a workable remedy, not an antiquated ideological gloss. Objections to religious underpinnings aside, a more neutral and pragmatic sociological view of marriage also might argue for the supremacy of fault. A disincentive to divorce might maintain the solidarity of the family in a rapidly evolving society. Encouraging, if not mandating, the continuation of unstable and unhappy unions, however, may not provide the proper environment in which to raise children or have people spend their adult lives. Making the remedy of separation and divorce more accessible to spouses who deem that their marriage no longer is a viable personal enterprise would not undermine family solidarity, but, in fact, might strengthen it. The law has a two-fold mission in this area. It must achieve a viable equilibrium between individual and societal interests by inculcating, on the one hand, a sense of the importance of marriage and the family in the community and, on the other hand, by providing individuals with a relatively easy means to disengage themselves from a tormenting bond.

Recommendations

Rather than enumerating the worst possible conduct that spouses can inflict upon one another, article 138, in an effort to align itself with the substance of article 86, could outline morally neutral grounds upon which a separation and ultimately a divorce can be granted. For example, article 138 could list (1) medical reasons for granting a separation, *e.g.*, incurable mental disease, venereal disease, an incurable and repugnant disease, or a contagious illness; (2) basic incompatibility of temperament, when at least one of the spouses is convinced that they simply do not get along; and (3) *de facto* separation of the spouses for a required period of time, reflecting an irremediable breakdown of relations between the spouses. Under this framework, separation and divorce would cease to carry much of its social stigma; it no longer would connote per-

75. See *Hingle v. Hingle*, 369 So. 2d 271 (La. App. 4th Cir. 1979) (Beer, J., concurring); *Dixon v. Dixon*, 357 So. 2d 856 (La. App. 4th Cir. 1978) (Beer, J., concurring).

sonal culpability and failure, but would stand for the view that the marriage no longer is a viable union for the spouses; that the failure of communication has been such that it has engendered a bankruptcy of the joint venture. Much like the grounds under article 138(9) and (10), the notion of incompatibility of temperament and de facto separation imply mutual consent grounds, the law recognizing that the spouses are responsible and in the best position to assess the quality of their relationship. A separation and divorce upon the basis of fault should be an exceptional proceeding, the culpability factor being relegated to a deserved secondary, if not tertiary, status in the breakdown of marriage.

A Comparative Reference

When contrasted with its French counterpart,⁷⁶ article 138 manifests a definite preference for fault-based separation. The recently revised French codal provision lists three grounds for separation and divorce in the following order: (1) mutual consent; (2) break up of the common life; and (3) the traditional grounds for divorce.⁷⁷ The French *Code civil* establishes mutual consent as the preferred ground in separation and divorce cases; the reference to the traditional fault grounds appears last and does not involve any extensive enumeration.⁷⁸ The ostensible purpose of the French legislation is to attenuate, if not eliminate, the unpleasant and contentious character of separation and divorce proceedings by minimizing the role of fault in such litigation.⁷⁹

Despite the historical affinity between the two civilian jurisdictions, the French solution may not be entirely appropriate in Louisiana. The aim of the comparison is not to make the Louisiana Civil Code a carbon copy of the French *Code civil*, but rather to determine whether the concept of fault as it is incorporated in the Louisiana codal provisions remains viable in light of the experimentation and reform in other civilian jurisdictions. Although the

76. C. CIV. art. 229.

77. *Id.*

78. *Id.*

79. The new French divorce legislation has given rise to numerous commentaries and studies. See, e.g., CENTRE NATIONAL RECHERCHE SCIENTIFIQUE, REFORMES DU DROIT DE LA FAMILLE, in 20 ARCHIVES DE PHILOSOPHIE DU DROIT (1975); R. LINDON & P. BERTIN, DIVORCE 76 (1976); J. MASSIP, LA REFORME DU DIVORCE (1976); J. MASSIP & G. MORTIN, LA REFORME DU DIVORCE (1976); Audit, *Recent Revisions of the French Civil Code, the French Divorce Reform Law of 1976*, 38 LA. L. REV. 747 (1978); Glendon, *The French Divorce Reform Law of 1976*, 24 AM. J. COMP. L. 166 (1976).

hybrid character of article 138 shows a tendency toward liberalization, the prominence of the fault grounds in the body of the provision reflects a retributive rather than remedial concept of separation and divorce. The Code holds steadfastly to a conservative, traditional view, perhaps in the name of upholding the value of family solidarity. Within the framework of article 138, the mutual consent grounds appear to be a hesitant afterthought, a begrudging and partial willingness to admit that some social evolution has taken place since article 138 was originally enacted.

An Organic Interpretation of Fault

The cardinal importance attributed to the fault rationale by the Louisiana Civil Code in the breakdown of marriage raises analytic problems not only with the substance of article 138, but also with other provisions of Book I. When article 138 is viewed in relation to articles 141 and 160,⁸⁰ the status of the fault rationale comes into question. Does one definition of fault apply to separation questions and yet another apply to alimony determinations? What is the impact of the new language of article 141 upon separation and alimony issues? Does it have a separate impact upon each of these considerations? The following analysis addresses these and other salient problems which arise in Book I as a result of the primacy of fault in separation, divorce, and alimony determinations.

THE IMPLICATIONS OF THE REFORMULATION OF ARTICLE 141

Before the enactment of article 141 in its present form,⁸¹ under the theory of recrimination and its equitable rationale of "unclean hands," if each spouse could establish fault on the part of the other, both were prevented from obtaining a separation or divorce.⁸² The courts applied the principle of recrimination in cases in which the spouses were deemed to be equally at fault, reasoning that remedies were reserved to an offended and nonculpable

80. LA. CIV. CODE ANN. arts. 141 & 160 (West Supp. 1982).

81. *Id.* art. 141.

82. See, e.g., *Brocato v. Brocato*, 369 So. 2d 1083 (La. App. 1st Cir.), *writ refused*, 371 So. 2d 1341 (La. 1979); *Dixon v. Dixon*, 357 So. 2d 856 (La. App. 4th Cir. 1978); *Couvillion v. Couvillion*, 346 So. 2d 310 (La. App. 4th Cir. 1977); *Lawrence v. Lawrence*, 352 So. 2d 378 (La. App. 4th Cir. 1977); *Denbo v. Denbo*, 345 So. 2d 1257 (La. App. 1st Cir. 1977); *Richard v. Richard*, 340 So. 2d 1104 (La. App. 3d Cir. 1976). See also Note, 24 *LOV. L. REV.* 776 (1978).

spouse.⁸³ In order to deal with cases in which there was a disproportion between the fault of the parties, the courts invoked the doctrine of comparative rectitude under which the spouse who was guilty of a lesser fault became entitled to relief.⁸⁴ Comparative rectitude, then, eliminated the inequity that could result from a rigid judicial application of the recrimination principle by allowing the courts to find a sufficient disparity between the respective fault of the parties to provide one of them with a remedy. Presumably, although entitled to a separation, the spouse who had a lesser fault could not seek permanent alimony upon the granting of a divorce.

The new language of article 141 eliminates the blatant inequity that flowed from an application of the theory of recrimination by providing that "separation from bed and board shall be granted although both spouses are mutually at fault in causing the separation."⁸⁵ While mutual fault now does not prevent the spouses from obtaining a separation and (presumably) ultimately a divorce, fault remains a determinative factor in assessing the financial consequences of the dissolution. The language of article 141 further provides that "[i]n such instances, alimony pendente lite may be allowed but permanent alimony shall not be allowed thereafter following divorce."⁸⁶ This language accords with the substance of article 160 which requires that a spouse seeking permanent alimony be free of fault.⁸⁷

The 1976 enactment of article 141 was the product of a liberalizing trend aimed at eliminating the theory of recrimination: when two persons are seeking to dissolve their marriage and each has established the fault of the other under article 138 (1) to (8), they should not be denied a remedy simply because both were at fault.⁸⁸ Under contemporary thinking, a contrary result is too egregious to justify in the name of any policy, no matter what its ideological or doctrinal underpinnings. While it is clear that the new language of article 141 eliminates the doctrine of recrimination, there remains some question as to whether it actually has or should have the same effect upon the doctrine of comparative rectitude—if not for purposes of separation under article 138, at least for purposes of

83. See R. PASCAL, *supra* note 4, at 139-43.

84. *Id.*

85. LA. CIV. CODE ANN. art. 141 (West Supp. 1982).

86. *Id.*

87. *Id.* art. 160.

88. See note 82 *supra* and accompanying text.

the permanent alimony determination under article 160. It could be argued that recrimination and comparative rectitude were so inextricably intertwined in a functional sense that once the former was eliminated the utility of the latter ceased altogether. Despite such arguments, the role of comparative rectitude, reinterpreted to function as does the doctrine of comparative negligence in tort liability cases, may not have been completely extinguished, especially in light of the fact that article 141, once it applies, precludes permanent alimony for either spouse. A weighing of the respective fault of the parties for the alimony determination could have significant practical and doctrinal import.

COMPARATIVE RECTITUDE IN THE CONTEXT OF PERMANENT ALIMONY DETERMINATIONS

It is evident that, under the current language of article 141, the doctrine of comparative rectitude no longer can serve its previous equitable function. Now, regardless of mutual fault, spouses can obtain a legal remedy. Article 141 speaks expressly in terms of the mutual and not the equal fault of the spouses. Viewing article 141 as a type of bridge between articles 138 and 160, one might interpret the separation and alimony provisions of article 141 to mean that, once either party establishes that the other spouse has engaged in conduct covered by article 138 (1) to (8), he or she may obtain a separation and ultimately a divorce, but that neither is entitled to permanent alimony. This interpretation of the implications of article 141 leaves a number of critical questions unanswered: Does the failure to refer explicitly to equal fault mean that the relative weighing of the respective fault no longer can take place in any context for any purpose? In light of its alimony provision, is the reference to fault in article 141 synonymous with fault under article 138? Can a distinction be made between fault for separation purposes and fault for permanent alimony considerations, between legal fault and a factually-established but legally nonactionable fault under article 160? Using a reasoning reminiscent of the doctrine of comparative rectitude, could article 141 be interpreted to mean that the spouse who is guilty of a much lesser fault than the other is still entitled to some form of permanent alimony under article 160?

In a recent opinion,⁸⁹ Judge Beer expressed the problem elo-

89. *Hingle v. Hingle*, 369 So. 2d 271 (La. App. 4th Cir. 1979).

quently and cogently:

We continue to be preoccupied with "fault" (which Webster defines as a moral weakness less serious than a vice), and that preoccupation continues—more often than not—to result in knee jerk determinations of "mutual fault."

It is an oversimplification to say that a marriage of 25 or 30 years which has gone stale, with resulting degrees of disappointment, contempt, disgust, and, finally, abhorrence on the part of the parties, is the result of "mutual fault" to the extent that such determination absolutely preempts any consideration of alimony. Unless one or the other of the parties has conducted himself or herself in a totally abhorrent and classically unacceptable way, the determination of an award of permanent alimony should not be irrebuttably preempted on a premise of such a disjointed, nebulous concept as "mutual fault." What is, in most cases, nothing more or less than mutual disillusionment should not summarily deprive *either party* of their justiciable right to seek alimony.⁹⁰

In his evaluation of the "jurisprudential treatment of the alimony issue"⁹¹ in Louisiana, Judge Beer further states that, "from the standpoint of realism and common sense . . . the central guideline should be need—instead of fault (or gender)."⁹² Article 141 does not explicitly abolish comparative rectitude and, as a consequence, the doctrine could be retained in some form as an instrument of judicial construction applying to permanent alimony determinations. Indeed, if the Louisiana Code is to maintain some commitment to the fault rationale while pursuing a liberalization of the law in this area, the doctrine of comparative rectitude might constitute a useful first step in attenuating the doctrinal impact of the fault concept.

THE FLOATING FAULT CALCULUS

Article 138 (1) to (8) defines the notion of fault by enumerating a presumably exhaustive list of marital fault categories. Some of the fault grounds are less rigorous than others. For example, the abuse of alcohol is a less comprehensive and less open-ended ground than cruel treatment, which the decisional law has interpreted to include mental cruelty.⁹³ Moreover, some of the provi-

90. *Id.* at 272-73 (Beer, J., concurring) (emphasis in original).

91. *Id.* at 273.

92. *Id.*

93. *See, e.g., Adams v. Adams*, 380 So. 2d 737 (La. App. 4th Cir.), writ granted, 383

sions appear to be inconsistent on their face;⁹⁴ others seem to pose considerable problems of interpretation in relation to other provisions in the Code.⁹⁵ Be that as it may, article 138 establishes no grading or ordering of the grounds in terms of a substantive hierarchy; it seems that some grounds are easier to establish than others or they at least reflect less blameworthy conduct (mental cruelty being assessed by a subjective standard is a case in point).⁹⁶ Depending upon how a particular court reads the specific circumstances of individual cases, it is possible to have a widely varying scale of conduct amounting to legal fault in the marriage context: from quotidian friction and constant nagging to abuse of stimulants and intentional nonsupport to outright physical brutality.

A priori, there is nothing wrong with having fault grounds which cover a vast spectrum of conduct; in fact, it may be a way of liberalizing the fault concept for separation purposes without eradicating it or unduly minimizing it. If the spouses want to state officially why their marriage broke down in terms of the causative categories provided by law, they can do so and gain whatever satisfaction is offered by such a procedure. They may want the disparity and disproportion between their conduct to be recognized: the wife may be a habitual nagger while the husband is addicted to alcohol; the wife may have committed adultery while the husband was standing trial for a felony; the husband may have publicly defamed his wife after she attempted to take his life. Whether the spouses want to terminate their joint venture on the basis of mutual consent or as a result of what each of them conceives to be the fault of the other, they should be afforded an appropriate legal remedy. The disproportion between the respective wrongful conduct is of no significance provided the effect of fault, determined

So. 2d 1263 (La. 1980); *Gibbon v. Gibbon*, 337 So. 2d 298 (La. App. 2d Cir. 1976); *Loyd v. Loyd*, 336 So. 2d 912 (La. App. 2d Cir. 1976); *McVay v. McVay*, 276 So. 2d 926 (La. App. 3d Cir. 1973); *Manley v. Manley*, 188 So. 2d 194 (La. App. 2d Cir. 1966).

94. See LA. CIV. CODE ANN. art. 138(7) (West Supp. 1982), which speaks of a spouse being charged with a felony, then refers to evidence indicating that the spouse has actually been guilty of such a felony. Also, one wonders why article 138(6) is not included in the article 139 enumeration along with adultery and conviction of felony. It seems that the attempt on the life of one spouse by the other would be as serious as the other two grounds. For this latter point, I am indebted to Mr. David Amoni, a third-year law student at Tulane University School of Law. Finally, it seems inconsistent to have the paragraphs, article 138(9) & (10) essentially performing the same function on the basis of different statutory periods of voluntary separation.

95. Most notably, the problem of the interrelation between *id.* arts. 138, 141 & 160.

96. See R. PASCAL, *supra* note 4, at 116.

under article 138, is limited to the granting of a separation and divorce.

Once fault is established, however, it does technically, as Judge Beer pointed out,⁹⁷ have a dispositive effect upon whether a spouse is entitled to alimony (and it may also have an indirect impact upon the child custody question). Here, both articles 141 and 160 appear to provide that, once a spouse is held to be at fault under article 138, he or she is barred from receiving permanent alimony (regardless of need).⁹⁸ The disproportion between the wrongful acts for purposes of this determination should be relevant, especially if the need on the part of the spouse who is less at fault is substantial. The utility of maintaining the doctrine of comparative rectitude for alimony purposes,⁹⁹ then, is evident; it constitutes a means by which to introduce different definitions of the concept of marital fault in the several articles and to establish that, although a given conduct may be actionable as fault for article 138 separation purposes, it does not constitute a legal or proximate cause or fault for purposes of permanent alimony determinations under article 160. This floating fault calculus, while it would increase their discretion in these matters, would allow the courts to minimize the impact of fault upon the financial consequences of a dissolution of marriage and emphasize the consideration of need at least in circumstances in which a spouse has done relatively little to make the marriage fail according to technical legal conceptions.

To some extent the courts already have laid the groundwork for these separate definitions of marital fault. In interpreting and applying article 160, for example, the courts have referred to fault in a two-fold manner. On the one hand, they have considered article 160 fault (which is dispositive of the alimony question) as the equivalent of a finding of fault under article 138(1) to (8):¹⁰⁰ if a spouse is adjudged to have been mentally cruel, then that spouse

97. See note 89 *supra* and accompanying text.

98. LA. CIV. CODE ANN. arts. 140 & 160 (West Supp. 1982).

99. For an application of the doctrine, see, e.g., *Douglas v. Douglas*, 342 So. 2d 1124 (La. App. 4th Cir. 1976); *Rayborn v. Rayborn*, 246 So. 2d 400 (La. App. 1st Cir.), *writ refused*, 258 La. 775, 247 So. 2d 868 (1971); *O'Neill v. O'Neill*, 196 So. 2d 669 (La. App. 1st Cir. 1967).

100. See, e.g., *Smith v. Smith*, 216 So. 2d 391 (La. App. 3d Cir. 1968). See also *Douglas v. Douglas*, 385 So. 2d 402 (La. App. 1st Cir.), *writ refused*, 386 So. 2d 358 (La. 1980); *Brocato v. Brocato*, 369 So. 2d 1083 (La. App. 1st Cir.), *writ refused*, 371 So. 2d 1341 (La. 1979); *Saucier v. Saucier*, 357 So. 2d 1378 (La. App. 4th Cir. 1978); R. PASCAL, *supra* note 4, at 235-39.

has been at fault and is not entitled to permanent alimony, whatever his or her need may be. On the other hand, and in almost the same breath, the courts have spoken of actionable fault under article 160 as conduct of a serious nature which amounts to an independent contributing factor or a proximate cause of the separation.¹⁰¹ This double characterization is not without its doctrinal implications, especially in a civilian jurisdiction in which the Code outlines expressly the instances of marital fault for separation purposes. By adopting this proximate cause formulation to refer to fault, the courts appear to be asking for a certain latitude in interpreting and a certain discretion in applying the fault concept under article 160. To avoid gross inequity and patent injustice, there is a need, felt by the jurisprudence, to incorporate some equivalent of the doctrine of comparative rectitude into the alimony area, to devise, in effect, separate definitions of fault for different legal questions relating to the breakdown of a marriage.

The argument for construing the Louisiana Civil Code to provide for a floating fault calculus between articles 138, 141 and 160 (which admittedly has been motivated by the conviction that the concept of fault occupies an altogether unwarranted place of primacy in this area) loses some of its thrust in the face of the jurisprudential rule that, once the fault question has been litigated in a separation proceeding, it cannot be relitigated in the divorce proceeding unless there has been post-separation fault.¹⁰² It seems, however, that the relitigation issue is one question, while the issue of whether the finding of fault for separation purposes will be binding for article 160 alimony is another question altogether. Although the type of conduct required to fall within the limits of article 138(3) and ultimately to invoke the remedy provided for in article 141 may be quite minimal, the preclusion of a spouse in need from permanent alimony should reflect, in the words of Judge Beer, "totally abhorrent" conduct.¹⁰³ When two persons are involved in an unsatisfactory and perhaps agonizing personal relationship, it is extremely unlikely that either spouse can escape the reach of a flexible culpability rule (if that consideration is at all relevant in these circumstances). A finding of legal fault (which, in

101. See generally cases cited note 100 *supra*.

102. See, e.g., *Laurent v. Laurent*, 369 So. 2d 476 (La. App. 4th Cir.), writ refused, 371 So. 2d 1343 (La. 1979); *DeFatta v. DeFatta*, 352 So. 2d 287 (La. App. 2d Cir. 1977); *Perez v. Perez*, 334 So. 2d 719 (La. App. 4th Cir.), cert. denied, 338 So. 2d 700 (La. 1976); *Schillaci v. Schillaci*, 339 So. 2d 532 (La. App. 4th Cir. 1976).

103. See notes 89-90 *supra* and accompanying text.

effect, may have little to say about the conduct or the character of the person) should not bar the spouse who is at a substantial financial disadvantage from gaining some type of minimal support for a period of time. This type of result is buttressed by the pragmatic consideration that the State would otherwise bear the financial burden of such an outcome and also, more importantly, by a basic sense of humanity and justice—not to speak of common sense.

JUDICIAL CONSTRUCTION OF ARTICLE 141

The courts have construed the substance of article 141 without directly resolving the question of whether it eliminates the doctrine of comparative rectitude. In *Brocato v. Brocato*,¹⁰⁴ a case decided in 1979, the court held that "it is [not] necessary for the trial court to weigh the proportional wrongs of each party under the doctrine of comparative rectitude."¹⁰⁵ The court reasoned that "[i]f the fault of each party, equal or unequal, standing alone is sufficient to award the other a judgment of separation, then their respective fault is deemed to be mutual."¹⁰⁶ The jurisprudence, then, harmonizes perfectly with the express language of article 141; neither source, however, addresses the question of the future status of the doctrine of comparative rectitude and its implications upon the permanent alimony determination. Is the fault determination for separation purposes to be the same for permanent alimony considerations?

THE OSTENSIBLE SCOPE OF ARTICLE 141

Article 141 provides that "[a] separation from bed and board shall be granted although both spouses are mutually at fault in

104. 369 So. 2d 1083 (La. App. 1st Cir.), writ denied, 371 So. 2d 1341 (La. 1979).

105. *Id.* at 1086.

106. *Id.* Other recent decisions have held in the same vein: *Post v. Post*, 376 So. 2d 1275 (La. App. 2d Cir. 1979) (article 141 does not require a finding of equal degrees of fault before a separation can be granted); *Rittiner v. Sinclair*, 374 So. 2d 680, 682 (La. App. 4th Cir. 1979) ("only fault which defeats a wife's entitlement to post-divorce alimony is fault which is sufficient to constitute grounds within C.C. 138 for separation in favor of the husband."); *Guin v. Guin*, 378 So. 2d 1022, 1023 (La. App. 2d Cir. 1979) ("degree of fault necessary to warrant a separation under any of the provisions of Art. 138 has been defined as 'unjustifiable conduct on the part of either husband or wife which so grievously wounds mental feelings of the other, or such as in any manner utterly destroys the legitimate ends and objects of matrimony.'") (quoting *Krauss v. Krauss*, 163 La. 218, 226, 111 So. 683, 685 (La. 1927)).

causing the separation. In such instances, alimony *pendente lite* may be allowed but permanent alimony shall not be allowed thereafter following divorce." It seems clear that the substance of article 141 was intended to apply to a rather classical situation. A typical case would consist of the following circumstances: the fault of the husband involves regular and violent physical cruelty to the wife as well as verbal abuse and false accusations; the wife drinks and uses drugs to excess, and often leaves the matrimonial domicile for extended periods of time, imposing her small children upon neighbors or relatives. In this case the conduct of each party obviously would constitute independent grounds for separation under article 138 or would be considered a proximate cause of the separation under any definition of fault. The fault not only is mutual, but it appears to be equally grave on both sides. Pending professional help, such a marriage probably should be dissolved for the good of all involved, and it should make little difference whether the dissolution takes place upon the basis of fault or the mutual consent of the parties.

Yet financially, the invoking of fault grounds obviously makes a substantial difference. If one of the spouses is in a precarious financial position and basically unable to support himself or herself properly, he or she is unable to obtain any permanent alimony. Although the basic rationale for such an outcome can be debated, that is the result mandated by the express language of articles 141 and 160.¹⁰⁷

JURISDICTIONAL PROBLEMS AND THE FAULT NOTION

Under the full faith and credit clause of the United States Constitution,¹⁰⁸ the courts of a state have jurisdiction to adjudicate a party's change of marital status if at least one of the parties to the marriage is domiciled in that state. The celebrated *Williams v. North Carolina* cases¹⁰⁹ held that the status established in such *ex*

107. LA. CIV. CODE ANN. arts. 141 & 160 (West Supp. 1982).

108. U.S. CONST. art. IV, § 1.

109. *Williams v. North Carolina*, 317 U.S. 287 (1942); *Williams v. North Carolina*, 325 U.S. 226 (1945). The holdings of these cases have been described as follows: in the first *Williams* case, the Supreme Court held "that the *ex parte* decree of the state of one spouse's domicil must be recognized throughout the nation by force of the Constitution." In the second *Williams* case, "the Court held that, while the state of a spouse's domicil has the power to grant a divorce entitled to full faith and credit, the issue whether either spouse was, in fact, domiciled in the state of divorce is open for reexamination." W. WADLINGTON & M. PAULSEN, DOMESTIC RELATIONS 414-15 (1978).

parte divorce proceedings involving a domiciliary was valid in all sister states;¹¹⁰ the *Estin v. Estin*¹¹¹ and *Vanderbilt v. Vanderbilt*¹¹² decisions, however, qualified the interstate impact of such proceedings by limiting the *res judicata* effect to the status question and refusing to extend it to alimony, property and other incidents of the relationship. Accordingly, under established principles, a divorce decree rendered by a sister state—for purposes of full faith and credit—is divisible.¹¹³ the status determination is severable from the ruling on alimony and the financial consequences of the status change. In any event, since an alimony decision, like a custody ruling, is subject to modification (it is not a final judgment), it is not entitled to full faith and credit.¹¹⁴ Moreover, in light of the fact that an alimony award is a money judgment, the court must have personal jurisdiction over the defendant to render a valid judgment.¹¹⁵

Article 160, at first blush, seems to confirm the substance of these well-established principles; it provides, in relevant part, that "[a]limony shall not be denied on the ground that one spouse obtained a valid divorce from the other spouse in a court of another state or country which had no jurisdiction over the person of the claimant spouse."¹¹⁶ Under this language it is clear that an alimony judgment rendered by a sister-state jurisdiction against a Louisiana resident will not be given full faith and credit in Louisiana unless the rendering court had personal jurisdiction over the Louisiana resident. A problem arises, however, in this regard due to the article 160 requirement that a spouse seeking alimony be free from fault.

Assume that one of the spouses to a marriage contracted and performed in Louisiana leaves the state, establishes a *bona fide* domicile in a sister jurisdiction, and sues the other spouse for divorce in that jurisdiction on the basis of the absent spouse's fault. The litigation proceeds normally and results in a judgment of divorce based upon the absent spouse's fault, say adultery. There is no mention in the decree of an alimony determination—we may

110. *Id.*

111. 334 U.S. 541 (1948).

112. 354 U.S. 416 (1957).

113. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §§ 6, 109 (1971). See also *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957).

114. See *id.* *Accord* *Worthley v. Worthley*, 44 Cal. 2d 465, 283 P.2d 19 (1955).

115. See note 113 *supra* and accompanying text.

116. LA. CIV. CODE ANN. art. 160 (West Supp. 1982).

assume that the court in the sister state held that it could not rule on that matter because it did not have personal jurisdiction over the absent spouse. The migratory spouse returns to Louisiana and petitions a state court to have the divorce judgment recognized on the basis of full faith and credit. Unless the other spouse can prove that the migratory spouse did not obtain a valid domicile in the sister state, the status change will have to be recognized in Louisiana—the marriage will be considered as legally dissolved.

A problem arises as to the fault determination that was reached under the status judgment. Remember that the migratory spouse obtained a divorce based upon the Louisiana spouse's fault (a fault which appears in the enumeration of articles 138 and 139). Under the divisibility doctrine, a state is required to give full faith and credit only to the status part of a sister state divorce decree; the financial incidents of the status change are severable and not entitled to full faith and credit. In the hypothetical example, no alimony determination was made, but the status change was effectuated upon the basis of fault. There is, therefore, a type of cause and effect relationship that applies—almost by definition—between the change of status and the reasons for which that change was made.

If the status determination is to be afforded full faith and credit, the latter extends to the entire status judgment, *i.e.*, the actual change and the reasons for it. As a consequence, if the Louisiana spouse were to file for alimony, that spouse—in theory at least—would be refused alimony because the divorce was granted upon the basis of his or her fault. If the previously quoted language of article 160 was meant to integrate the divisibility doctrine into the substance of the Code, it, however, does not apply here. The problem is outside the divisibility issue. The Louisiana spouse would be denied alimony not because a sister jurisdiction so adjudicated, but rather because Louisiana law, which applies to the alimony determination, premises all alimony determinations first on the basis of fault.

In terms of theory, the possibility of such a result raises questions about the full faith and credit doctrine. That doctrine is, however, constitutionally mandated. More importantly, the possible result illustrates the serious disadvantages that flow from the strict and unbending commitment of the Code to the fault concept in the alimony area. It is eminently conceivable that the Louisiana courts would, in practice, simply declare that a sister-state judg-

ment cannot impinge in any way upon the alimony determination or deploy a floating fault calculus or similar idea in these circumstances. The mere fact that such a problem can arise in purely theoretical terms, however, is enough to have the fault scheme reconsidered as a viable mechanism by which to transfer wealth upon the permanent dissolution of marriage.

THE ROLE OF FAULT RECONSIDERED

How much will be sacrificed to preserve the sanctity of fault? One codal provision views marriage as a secular institution—a civil contract to which the ordinary principles of contract law apply. Given the fundamental importance of marriage and the family in society, however, the principle of individual autonomy in contractual matters must be tempered by public policy considerations. The State has a right, even a duty, to foster the stability of marriages and the family in the community. A quasi-ecclesiastic heritage would extend the regulatory authority of the State to its outer limits and eradicate the notion of individual autonomy to promote the view that marriage, no matter how agonizing for and destructive of the individuals involved, is essentially an indissoluble bond. Under this view as reinterpreted for more secular purposes, divorce can be had only by alleging odious conduct and engaging in a painstaking procedural process.

Despite attempts to attenuate the fault ideology, the Louisiana Civil Code, as a document proclaiming the guiding principles of the Louisiana juridical order, remains unequivocally committed to fault-based separation and divorce. The substantive provisions which articulate more contemporary mores and notions of the marriage relationship occupy a distinctively secondary status in the body of the Code. The nonfault mutual consent grounds for separation and ultimately divorce are attached to the end of a long list of the traditional fault grounds, and there appears to be some confusion about the respective statutory periods of de facto separation that will permit mutual consent separation. The advances achieved by article 141 in terms of recrimination are muted when the ugly specter of fault raises its head to supervise the financial consequences of divorce based upon mutual fault. The substance of article 160 is perhaps the chief spokesman for the dominance of the fault ideology—the absolutist answer to relative and varying human predicaments. No matter what the need, no matter what the public fiscal consequence, a spouse who has been at fault, mini-

mally or otherwise, cannot be granted alimony. All this adhered to apparently in the name of maintaining the institution of the family, but to the neglect of vital human considerations which are at the very heart of the family unit.

Marriage comprises all the human expectations that accompany love and the birth of children, expectations which sometimes are frustrated and disappointed for many reasons. In legal terms, the definition of marriage is stated in less emotional and more conceptual terms, although the words which articulate the idea have the strongest impact upon the most deeply felt emotions. In Book I of the Louisiana Civil Code, there seem to be two not entirely harmonious definitions of marriage: One is that it is a civil contract, which recognizes unmistakably the possibility of divorce, giving expression to individual autonomy and responsibility, and the other, perhaps dispositive, view is that marriage is a nearly indissoluble union which, for reasons, imagined or otherwise, of social policy or ideological baggage, can be dissolved principally upon the basis of egregious wrongful conduct for which the actor in question must be punished. The very structure of article 138, although it does not create an explicit ordering among the fault grounds, gives primacy to the notion of fault. The civil character of marriage seems to predominate at its inception—it is easy to get married, while the less secular concept and the notion of State-imposed regulation appear to govern its dissolution.

People enter into all sorts of contractual relationships with expectations that become frustrated; once a failure to perform or a defective performance is established, the question is raised: Which party is responsible for the breach? Marriage is a special type of contractual agreement which, of course, can be breached in many ways. The principal element of the bargain is an exchange, a mutual giving of personalities in the hope that the circumstances of life will allow them to be compatible. At the moment of marriage, positive expectations are high and the old myth of the androgyne stands forth in its strongest form. The risk factor, however, also can be substantial; impressionistic views can be rendered even more superficial by strong emotions. The decision to live with another person involves accepting a character and history that will become fully apparent only through time. Moreover, the fact that a young adult marries does not eliminate his or her potential for growth—people can change and perhaps should change with the lessons of experience. All this to say that a breach of this special

contract is more a reflection of the evolution of the life processes and a determination that the potential projected harmony between two personalities was simply a mutual miscalculation. In some, if not most, cases of separation and divorce, the alleged fault is no more than a symptom of a basic clash of personalities. In this sort of equation, the culpability factor is a mere artifice; although the term irreconcilable differences may appear to be a frivolous catch-all phrase, expressing the State's abdication of its responsibilities, it is perhaps the most accurate representation of what actually happens when a marriage fails. The root cause of the problem is a basic and fundamental inability of the spouses to get along because of their differences in character and personality. This attitude towards divorce appears to have been adopted in Louisiana with considerable circumspection; indeed, it is the last ground under article 138. It is submitted that the psychological reality of marital breakdowns should be afforded greater prominence in the legal regulation of separation and divorce in Louisiana.

What are the specifically juristic problems with the present provisions governing the termination of marriage and what solutions can be proposed? There is clearly some doctrinal inconsistency between the position taken in article 86 that marriage is a civil contract and the heavy emphasis placed upon fault in articles 138, 139, 141 and 160. In terms of the structure of the Code, simply tagging on mutual consent grounds at the end of the article 138 enumeration is not a particularly felicitous method to integrate changes of social ideology into the Code. The piecemeal reassessment and modification of Book I has created glaring inconsistencies and unwarranted confusion. In the final analysis, it is an unsatisfactory approach by which to deal with the substance of a document that is to act as the juridical beacon for Louisiana's legal system and unique civilian culture. In these circumstances, it is necessary to recall Professors Spaht and Shaw's description of Book I and its desired structural harmony:

Book I of the Louisiana Civil Code, entitled "Of Persons" and containing a highly ordered system for the regulation of family life, shares with other branches of our private law the harmonious structure that is the hallmark of a civil law system. Because of its smoothly articulated structure, the codal scheme, the product of the thought and experience of many generations of legal scholars and administrators, is highly vulnerable to untoward tinkering with its several parts. A change in detail may signal a restructuring of the

whole.¹¹⁷

The enactment of article 138(9) and (10) was more than a change in detail; it represented a challenge to a formerly unquestioned ideology of fault in matters of separation and divorce. This is the course of action that has been adopted by several civilian jurisdictions in the recent past, most notably, France. Although this liberalizing measure may have had a substantial impact in practice, its implementation into the substance of Book I was somewhat disguised and hesitant, provoking disorientation in the basic ideological orientation of the Code in the area of Persons. The ambiguity of the status of mutual consent separation and divorce became especially pronounced when the fault barrier to alimony determinations remained intact. It is a well-settled rule of Louisiana law that, while fault is irrelevant in a proceeding for separation based upon mutual consent, the fault question can be litigated when alimony is requested in a divorce action based upon mutual consent.¹¹⁸ The status change can be made without any reference to fault, but the determination of the financial consequences of divorce, in the absence of an agreement on this matter by the parties approved by a court, cannot take place without a fault determination. The mutual consent notion has had no impact upon the alimony provisions.

A possible remedy to the fundamental disharmony occasioned in the fabric of the Code by the incorporation of the mutual consent concept would be to rely upon the courts to exercise their discretion in these matters and to manipulate the codal provisions so as to avoid their unsalutary effects. The notion of a floating fault calculus buttressed by the doctrine of comparative rectitude and the notion of fault as a proximate causative factor might constitute a judicially articulated and applied solution. In systemic terms, however, especially in a civilian jurisdiction, judicial artifice—no matter how astute—does not appear to be the most propitious solution. The Louisiana Civil Code has a distinguished history and occupies a position of cardinal importance in Louisiana's legal system and culture. Its provisions on the law of Persons deserve bet-

117. Spaht & Shaw, note 46 *supra*.

118. See, e.g., *Laurent v. Laurent*, 369 So. 2d 476 (La. App. 4th Cir.), *writ denied*, 371 So. 2d 1343 (La. 1979); *DeFatta v. DeFatta*, 352 So. 2d 287 (La. App. 2d Cir. 1977); *Moon v. Moon*, 345 So. 2d 168 (La. App. 3d Cir.), *cert. denied*, 347 So. 2d 250 (La. 1977); *Schillaci v. Schillaci*, 339 So. 2d 532 (La. App. 4th Cir. 1976). See also *Wagner v. Wagner*, 248 So. 2d 96 (La. App. 4th Cir. 1971); LA. CODE CIV. PRO. ANN. art. 3946(C) (West 1979).

ter than piecemeal attention which leaves the Code dressed in incongruity rather than clarity. Many of the codal articles reflect a historical affinity with the French legal system and its codification; they thereby continue to translate a nineteenth century view of the family, an institution which has undergone a metamorphosis in the twentieth century. Yet, in the last decade, the French Parliament restructured altogether the French law on Persons.¹¹⁹ Louisiana's attachment to other civilian jurisdictions should not remain a purely historical phenomenon, but rather a source of inspiration and cooperation leading to the elaboration of legal rules and principles which heed the lessons of the past, are mindful of the future, and respond to the continuing social mutations of the present.

Using the 1975 French law on divorce as a stepping stone, it is submitted that, in order to achieve the substantive and structural harmony which must be an attribute of the Louisiana Civil Code if it is to survive as the fundamental legal document of a United States jurisdiction, the grounds for separation and divorce be merged into one article which would order the grounds in terms of their importance: first, in terms of mutual consent and *de facto* separation of the spouses and, then, in the exceptional case, in terms of the traditional fault motive for separation and divorce. The fault grounds would not be enumerated expressly in order to rid the law of the image that it provides a means by which disappointed and disillusioned spouses can vent their anger and bitterness upon one another. In this way, the Code would convey, forcefully and unmistakably, the view that marriage is a civil contract in which the will of the partners is constrained by only the most necessary regulatory provisions. The permissible restraints that might be imposed upon the litigants are a mandatory period of reflection and the duty of the court to remind them that their actions will have a considerable impact upon their future lives. Realistically, and in terms of the legitimate exercise of its regulatory authority, the State should do no more than this. It cannot select a spouse for one of its citizens nor should it try to coerce him or her to remain with a person with whom satisfactory personal communication no longer is possible. If the State occupies any role in this process, it should be to assist the spouses to resolve their infelicitous union through an amicable settlement rather than to vent their frustrations through the legal process.

119. See note 79 *supra* and accompanying text.

Obviously, such a substantial modification of the grounds for separation and divorce would entail an equally considerable and necessary reformulation of the alimony formula. It is submitted that the concept of fault in this area carries with it a punitive rationale that has become totally incongruent with the evolving state of society. Traditionally, Louisiana law has distinguished between alimony *pendente lite* and permanent alimony.¹²⁰ The former is granted during the separation proceeding and until a divorce decree issues, and is based solely upon the need of the spouse who "has not a sufficient income for maintenance";¹²¹ the latter is awarded to a spouse upon divorce, and is based first upon a fault determination and, if the spouse requesting alimony is free from fault, then upon a need determination.¹²² Alimony *pendente lite* does not involve a fault component and has no ceiling (except that it is granted in proportion to need and means),¹²³ but permanent alimony is premised upon nonculpable conduct and has a maximum "which shall not exceed one-third" of the liable spouse's income.¹²⁴ Alimony *pendente lite* has a public policy character and cannot be waived by the agreement of the parties,¹²⁵ while permanent alimony—according to recent decisional law—is not a mandatory feature of the law and can be waived by private agreement.¹²⁶

There is a doctrinal justification for this distinction. Alimony *pendente lite* reflects the continuing obligation of support between the spouses under article 119; a legal separation, while it dissolves the community property regime and eliminates the duty of conjugal cohabitation under article 120, does not undo the mutual duties of husband and wife under article 119—one of which is support.¹²⁷ Permanent alimony, however, is granted after the bond of marriage has been completely dissolved. It is not anchored in the obligations outlined in any codal article. It is, according to the characterization of the decisional law, a "gratuity."¹²⁸ Fault is a dispositive first hurdle in a permanent alimony determination because it relates di-

120. LA. CIV. CODE ANN. arts. 148 & 160 (West Supp. 1982).

121. *Id.* art. 148.

122. *Id.* art. 160.

123. *Id.* art. 148.

124. *Id.* art. 160.

125. See *Holliday v. Holliday*, 358 So. 2d 618 (La. 1978).

126. See *Monk v. Monk*, 376 So. 2d 552 (La. App. 3d Cir. 1979).

127. See, e.g., *Liles v. Liles*, 369 So. 2d 479 (La. App. 4th Cir. 1979).

128. See, e.g., *Latour v. Guilbeau*, 256 So. 2d 731 (La. App. 3d Cir. 1972); *McMath v. Masters*, 198 So. 2d 734 (La. App. 3d Cir. 1967).

rectly to why the marriage bond was dissolved, whereas need becomes the primary and exclusive factor in alimony *pendente lite* even though the separation may be or has been granted upon the basis of the benefited spouse's fault because the article 119 obligations remain intact.

In terms of doctrine, the distinction between alimony *pendente lite* and permanent alimony is well-articulated, although in a civilian jurisdiction with a strong sense of public policy it is difficult, despite the technical persuasiveness of the reasoning, to understand why permanent alimony has no public policy character while alimony *pendente lite* does. Moreover, this technical distinction discounts, even disregards, the impact of legal construction and rules upon the litigants. If the concepts of marriage and divorce are to be articulated primarily in terms of mutual consent, the notion of fault has little, if any, place in alimony determinations. If the legal system is to continue to function as an instrument of justice, it cannot refuse to respond to the practical impact of its rules upon the litigants and the community as a whole. If marriages fail because initial assessments of personality and character were wrong on both sides, and culpable conduct is seen as a symptom of a more fundamental problem, then the financial consequences of divorce should be assessed on a morally and legally neutral ground—namely, that of need. Much like the child custody issue addressed in article 146, the question of permanent alimony should be determined equitably in accordance with the best interests of the parties involved. It has been argued by one distinguished legal scholar that the concept of alimony that should take hold in Louisiana is the one termed "rehabilitative alimony,"¹²⁹ an equitable sum of money granted to the spouse in need for a fixed period of time allowing him or her to fashion a new lifestyle. Clearly, this is the type of notion that would fit in perfectly with separation and divorce granted on the basis of mutual consent.

129. See Spaht, *Persons, The Work of the Louisiana Appellate Courts for the 1979-1980 Term—A Faculty Symposium*, 41 LA. L. REV. 372 (1981). In the 1981 session Senator Nelson introduced a bill which provided that alimony be rendered upon the basis of need alone. On June 3, 1981, the bill passed the Senate Committee and the Senate floor. Under the provisions of the Nelson Bill, alimony is granted to a spouse in need considering his or her earning capacity, provided the claimant spouse has not committed adultery. There is a five year maximum period for granting alimony. The bill now is being considered by the House Committee. I am indebted to Ms. Margaret Groome, a law student at Tulane Law School, for the press reports, dated April 29, 1981, on this development. The bill was defeated in the 1981 session. Senator Nelson, however, indicated that he is considering reintroducing a similar provision in 1982.

THE LEGITIMACY ISSUE

There are a number of minor, although not totally insignificant, semantic issues which arise from a reading of the chapters of Book I which relate to the status of children. For example, while article 27 defines legitimate children as "those who are born of a marriage lawfully contracted,"¹³⁰ and illegitimate children as "such as are born of an illicit union,"¹³¹ article 179 contains a less precise, potentially ambiguous, definition. Article 179 provides, in relevant part, that "[l]egitimate children are those who are either born or conceived during marriage,"¹³² leaving open the question of born or conceived during the marriage of whom. Under one reading of the codal language, one could conclude that a child is legitimate provided he is born while at least one of his biological parents is married to another person—a nonbiological parent. Such results have been reached under the application of article 184,¹³³ but it is unlikely that the legislature intended to foster such ambiguity. To some extent, the language of article 180 suffers from the same imprecision. A measure of clarity would be gained by modifying the language of these articles to meet the standards set by article 27¹³⁴ and by article 198 which speaks in terms of the "marriage of their father and mother."¹³⁵

Also, article 200,¹³⁶ which refers to legitimation by notarial act, contains a rather unhappy transposition of the language of Act 391 of 1972.¹³⁷ The latter amended the article to permit legitimation by either parent or both if they could marry each other either at the conception of the child or at the time of the legitimation.¹³⁸ The codal text reads in relevant part:

A father or mother shall have the power to legitimate his or her illegitimate children by an act passed before a notary . . . provided, there exists at the time of conception or at the time of the legitimation of such children no legal impediment to the marriage of the

130. LA. CIV. CODE ANN. art. 27 (West 1952).

131. *Id.*

132. *Id.* art. 179 (West Supp. 1982).

133. See, e.g., Pascal, *Who Is The Papa? (The Husband in Louisiana; the Paramour in France)*, 18 LA. L. REV. 685 (1958).

134. See notes 130-131 *supra* and accompanying text.

135. LA. CIV. CODE ANN. art. 198 (West Supp. 1982).

136. *Id.* art. 200.

137. See R. PASCAL, *supra* note 4, at 328.

138. *Id.*

father and mother.¹³⁹

In complete contradistinction to the purpose of the 1972 Act, the language of article 200 could be interpreted to mean that, in order to legitimate a child by notarial act, no legal impediment to the marriage of the father and mother could exist either at the time of conception or at the time of legitimation. A reformulation of the codal language to express unambiguously the intent of the 1972 Act would add clarity and promote the effort to liberalize and encourage legitimation.

At least prior to the recent reform of the legislation on legitimacy, the chief issue in this area of the law of Persons dealt with the presumption of paternity articulated in article 184. The text of article 184 reads the way it does in all other civilian jurisdictions which subscribe to the *pater is est* presumption: "The husband of the mother is presumed to be the father of all children born or conceived during the marriage."¹⁴⁰ As such, the presumption of paternity does not raise any doctrinal or analytic problems. It is simply meant to respond to the biological fact that the paternity of a man is more difficult to prove than a woman's maternity. It is based upon the view that marriage is a legitimate institution that will be disturbed only exceptionally by adultery and that children born or conceived within the confines of marriage and given birth by the wife are entitled to be considered as legitimate offsprings (*i.e.*, having the husband of their mother as their father) until the contrary is proven by an action in disavowal. The article establishes, on its face, a rebuttable presumption of paternity against the husband of the mother.

According to Professor Pascal, the French courts have applied and interpreted the presumption of paternity in the way in which it was intended—merely as a rebuttable presumption.¹⁴¹ When the facts contradicted and, in effect, defeated the presumption, the child was considered illegitimate (born of an illicit union).¹⁴² At least prior to 1976, the Louisiana decisional law in many instances did not share this view of the function of the *pater is est* presumption, construing it at times as an irrebuttable presumption of paternity.¹⁴³ Although it led to the most unfortunate results, the Lou-

139. LA. CIV. CODE ANN. art. 200 (West Supp. 1982).

140. *Id.* art. 184.

141. See note 133 *supra* and accompanying text.

142. *Id.*

143. See, *e.g.*, Spaht & Shaw, note 46 *supra*.

isiana courts considered the article 184 presumption to be an instrument by which to confer the status of legitimacy upon children born of the wife's relationship with a man other than her husband.¹⁴⁴

In *Succession of Goss*,¹⁴⁵ a 1974 case, for example, the court declared that it was the public policy of Louisiana to "insure that the legitimacy of a child will be maintained whenever possible, provide presumptions of the strictest nature, and protect helpless children, born legitimate, from illegitimation by one or both of their parents for their own selfish aims."¹⁴⁶ In effect, the presumption of paternity, in order to safeguard children, was deemed to be "absolute and irrefutable," but for the action in disavowal which almost never was successful.¹⁴⁷ According to Professor Spaht,

In order to protect children from the stigma of illegitimacy, . . . Louisiana courts have frequently related two persons in the father-child bond who could not possibly have a biological connection. . . . The presumption established in Article 184 was not intended to be irrebuttable. Strict judicial interpretation of the causes of an action *en desaveu* and severe limitations on the right to bring it have rendered the presumption practically irrebuttable. Application of the presumption occasionally produces absurd results, but its inviolability has been favored as a protection to children individually and to the family as a unit.¹⁴⁸

Professor Pascal draws the same conclusion:

For over a century the unwillingness to label a child an illegitimate has led to decisions which imposed legitimate descent from the husband of the mother on children who never claimed him as father and imposed paternity on husbands in situations in which no geneticist or layman would even suspect him of fatherhood in fact.¹⁴⁹

In effect, for purposes of wrongful death and workmen's compensation actions, the Louisiana courts developed the categories of the legitimate and the illegitimate father.¹⁵⁰

144. *Id.*

145. 304 So. 2d 704 (La. App. 3d Cir. 1974), *writ denied*, 309 So. 2d 339 (La.), *cert. denied*, 422 U.S. 869 (1975).

146. *Id.* at 708 (citations omitted).

147. *Id.* See also *Tannehill v. Tannehill*, 261 La. 933, 261 So. 2d 619 (1972) and *Tannehill v. Tannehill*, 226 So. 2d 185 (La. App. 3d Cir. 1969).

148. See note 143 *supra* and accompanying text.

149. Pascal, *supra* note 133, at 687-88.

150. See note 143 *supra* and accompanying text.

Under the Louisiana decisional law prior to 1976, the presumption of paternity ceased to reflect the biological differences between men and women and the evidentiary difficulties that were associated with paternity. Rather, it became a convenient instrument by which to give expression to a public policy concern that the status of illegitimacy be avoided at all possible costs. The courts perceived the children born of an illicit union as the helpless and hapless victims of adult conduct—the unknowing third-party recipients of an ugly and unwanted stigma of social outcasts. In their enthusiasm to rescue children from the legal, social and psychological consequences of illegitimacy, the courts failed to perceive that the price of their humanitarianism was not being evenly distributed throughout society—that, in fact, one class of persons was being singled out to bear the costs of the campaign to eradicate the category of illegitimacy.

There was no reasonable equivalent to the article 184 presumption directed at wives until 1980.¹⁵¹ This provision, however, was eliminated by 1981 legislation.¹⁵² As long as the presumption was used to compensate for evident and undeniable biological differences, no illegal discrimination upon the basis of sex could be alleged. When the presumption became an instrument for conferring legitimate status upon children and ceased to serve its intended function, husbands were made to bear an onus because of their sex. While a wife could have an affair and have the child born of that illicit union declared to be the child of her husband, the husband who had a child with a woman other than his wife could not have that child declared to be the legitimate offspring of his marriage. The costs of attributing the status of legitimacy to adulterine children (the net effect of attributing paternity despite evident biological fact to the contrary) were being borne exclusively by married men. In light of the recent concern over sex discrimination issues in Louisiana, especially in the alimony area,¹⁵³ it is surprising that this patent form of gender-based discrimination went unnoticed.¹⁵⁴ While women might be outraged (and justifiably so) at the idea of having a child that they did not bear declared to be their legitimate offspring through the operation of law because of

151. 1980 La. Acts. No. 549, § 1 (amending LA. CIV. CODE ANN. art. 209).

152. 1981 La. Acts. No. 720 (codified at LA. CIV. CODE ANN. art. 209 (West Supp. 1982)).

153. *See, e.g.*, *Lovell v. Lovell*, 378 So. 2d 418 (La. 1979).

154. For other commentaries upon article 184, *see, e.g.*, Note, 40 LA. L. REV. 1024 (1980); Note, 3 So. U. L. REV. 102 (1976).

their husband's extramarital activity, this is what has been happening to men in Louisiana for many years. In their quest to uphold the interests of children, the courts seem to have forgotten about the constitutional ramifications of their decisions, the rights and interests of unmarried biological fathers, and especially the rights of innocent husbands.

The sole remedy in these circumstances might have been to have article 184 amended to read explicitly that it was not an irrebuttable presumption, to have it declared unconstitutional under the Louisiana Constitution as interpreted by the decisional law, or to enact a similar provision applying to women and maternity. The recent legislative reform of the legitimacy provisions, begun in 1976, may have rendered such action unnecessary. Although the presumption of paternity appears in its traditional formulation, article 186 states a countervailing presumption which can defeat the application of article 184. Article 186 states that "[t]he husband of the mother is not presumed to be the father of the child if another man is presumed to be the father."¹⁵⁵ This language at least is an indication that the article 184 presumption is not and should not be interpreted as an irrebuttable presumption. The contrary presumption referred to in article 186 seemed to be contained in Civil Code article 209 relating to proof of filiation which, prior to its recent amendment, provided that "[e]vidence that the mother and alleged father were known as living in a state of concubinage and resided as such at the time when the child was conceived creates a rebuttable presumption of filiation between the child and the alleged father."¹⁵⁶ The 1981 legislation, however, abrogated this language and eliminated, without replacing it, this possible countervailing presumption to the article 184 presumption.¹⁵⁷ As a result of this modification, it is indeed difficult, if not impossible, to find any language supporting the substance of article 186. The severe restrictions on the action of disavowal, however, appear to have been relaxed somewhat,¹⁵⁸ indicating that the interpretation of article 184 as an irrebuttable presumption is unwarranted. Finally, if articles 198 and 199 dealing with the legitimation of children by the subsequent marriage of their biological parents and the repeal of the ban against the legitimation of adulterine children are to

155. LA. CIV. CODE ANN. art. 186 (West Supp. 1982).

156. 1980 La. Acts No. 549, § 1 (amending LA. CIV. CODE ANN. art. 209).

157. 1981 La. Acts No. 720 (codified at LA. CIV. CODE ANN. art. 209 (West Supp. 1982)).

158. LA. CIV. CODE ANN. arts. 187-190 (West Supp. 1982).

have any meaning,¹⁵⁹ the article 184 presumption cannot be interpreted as being irrebuttable.

Although this examination of the recent legislation on legitimacy is no more than a cursory overview, it does illustrate a liberalizing trend in this area that attempts to accommodate the interests of all the parties involved. All of these considerations, however, may become irrelevant in light of the decision in *Succession of Brown*,¹⁶⁰ a case decided by the Louisiana Supreme Court in September 1980 which declared article 919 unconstitutional and which led to the sweeping changes made by the 1981 legislature in Title I of Book III of the Civil Code.¹⁶¹

Prior to *Brown*, a series of United States Supreme Court decisions had whittled away at the discriminatory legislation aimed at illegitimate children, leaving inheritance, under the *Labine v. Vincent*¹⁶² decision in 1971, as the only area in which the status of illegitimacy could result in different treatment. In *Trimble v. Gordon*,¹⁶³ decided in 1977, the Court disregarded two of the three state interests in the unequal treatment of illegitimate children, namely, the promotion of legitimate family relationships and the options that a parent could exercise to insure an illegitimate child a portion of his estate.¹⁶⁴ In *Brown* the Louisiana Supreme Court effectively rejected the third state interest, *i.e.*, the orderly disposition of property upon death.¹⁶⁵ If the consequences of *Brown* are as radical as they appear to be, there seems to be little reason to maintain the codal provisions on legitimacy in Book I, since the legal status of legitimacy and illegitimacy will be devoid of any legal consequences. It is quite clear that article 206¹⁶⁶ will become meaningless if *Brown* is given its full impact in the Code. The center of attention, then, may be shifted from problems of illegitimacy to those of acknowledgement and proving filiation.¹⁶⁷

159. *Id.* arts. 198 & 199.

160. 388 So. 2d 1151 (La. 1980), *cert. denied*, 450 U.S. 998 (1981). See Note, 27 Loy. L. Rev. 237 (1981).

161. 1981 La. Acts No. 919 (codified in scattered articles of the Civil Code).

162. 401 U.S. 532 (1971).

163. 430 U.S. 762 (1977).

164. *Id.*

165. See note 160 *supra* and accompanying text.

166. LA. CIV. CODE ANN. art. 206 (West Supp. 1982).

167. There are a number of other aspects of Book I which deserve at least some brief mention in this analytic survey of the codal texts. When compared to its counterparts in the French Code, C. civ. 343-370, Louisiana Civil Code article 214, dealing with adoption, is somewhat curious since it does not establish any distinction between simple and plenary

CONCLUSIONS

The most evident conclusion that can be drawn from this admittedly selective consideration of Book I of the Louisiana Civil Code is that there is an undeniable and pressing need for a comprehensive reassessment of the substance of the codal provisions. Louisiana is a civilian (to some extent, a hybrid and *sui generis*) jurisdiction which is rightly proud of its juridical heritage and culture. If that tradition is to be perpetuated intact and unsoiled, it must be revitalized as it has been by the lucid revision and amendment of Book II and the revamping of some parts of Book III. The area of Persons is indispensable to the organic unity of the Code, and it is an area of litigation in which the social mutations perhaps are strongest, the most radical and the quickest to take place. The issues of palimony, surrogate parenthood and artificial insemination are on the horizon, and the subject of litigation in a number of states.¹⁶⁸ It is inconceivable that, in a civilian jurisdiction, the legal document that contains the guiding principles of the legal order should be riddled with so many inconsistencies, potential and actual ambiguities, semantic imprecisions, and in some cases an ideology relating to fundamental social institutions which is but a shadow of a tradition that was outpaced many years ago by the dynamics of social evolution.

Without presuming to enter into a debate with two eminent legal scholars,¹⁶⁹ the French civilian tradition was at least a source of inspiration for the drafters of the Louisiana Civil Code of 1808. In some instances the French doctrinal writings and judicial opinions still have some relevance to legal interpretation and judicial determinations in Louisiana. During the last decade, the signifi-

adoption. Under Louisiana law adoption represents a complete severance of ties between the adoptee and his natural family and a reinstatement of that relationship with the adoptive family but for maintaining the adoptee's inheritance rights in his natural family. The failure to establish this familiar distinction and the threat that anything but a total severance can have upon the process of adoption appears to be an anomaly in the Code. Also, it is somewhat incongruous to read the title of Chapter 5 as "Of Paternal Authority," and to have the provisions which appear under that chapter to be phrased in terms of parental authority. The problems associated with tutorship (i.e., splitting it and custody) and the liability for the delictual acts of children are all beyond the consideration of this textual survey.

168. See, e.g., W. WADLINGTON & M. PAULSEN, DOMESTIC RELATIONS 682-90 (1978); Castillo, *Judges Flip the Family Album*, N.Y. Times, May 3, 1981, § 4, at E9, col. 1; *Whose Baby Is It, Anyway?* NEWSWEEK, Apr. 6, 1981, at 83; Griffin, *Surrogate Mothers*, STUDENT LAWYER, Apr. 1981, at 29.

169. I am referring to the debate between Professors Batiza and Pascal concerning the sources of the Louisiana Civil Code.

cant date being 1975, the French completely revised their codal provisions relating to the law of Persons. While the French experience is not perfect and can be subject to some strong doctrinal criticism, it can and should serve as a stepping stone for a similar Louisiana revision in this area. Louisiana's unique stature in the United States and the world can only be enhanced by developing its civilian bonds and comparative reference to other legal cultures. In the last analysis, Book I, while it remains a workable legal document thanks to judicial supervision, is sorely in need of comprehensive reconsideration—the type of reconsideration exemplified in the recent legitimacy legislation.